

1 This action proceeds on Plaintiff's Second Amended Complaint filed March 30,
2 2009. (ECF No. 62.) The Court screened Plaintiff's Complaint finding that it stated a
3 cognizable claim for relief against Defendant BOP for a violation of the Privacy Act, 5
4 U.S.C. § 552a. (ECF Nos. 86 & 91.)
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6 **II. ARGUMENT**

7 In his Motion, Defendant BOP puts forth several arguments for dismissal: 1) Plaintiff
8 failed to exhaust his administrative remedies; 2) Plaintiff's claim is barred by the Privacy
9 Act's statute of limitations; and 3) records in BOP's inmate central file system are exempt
10 from the Privacy Act.¹

11 As to the exhaustion argument, Defendant states that the BOP SENTRY computer
12 system is a database that includes and tracks all administrative grievances filed by inmates
13 incarcerated at BOP. (ECF No. 97-2, ex. A, pp. 1-3.) The system shows that Plaintiff has
14 filed numerous grievances since 1991. (ECF No. 97-3.) However, none of his grievance
15 filings alleged a violation of the Privacy Act or challenged any documentation in BOP
16 inmate records. (Id.; ECF No. 97-2, ex. A, p. 2.) Thus, Defendant argues, Plaintiff failed
17 to file any administrative grievance alleging the violations claimed here, much less exhaust
18 his administrative remedies.
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21 In his Opposition, Plaintiff appears to be arguing that he did in fact attempt to
22 exhaust his available administrative remedies, but stopped because it was futile. Plaintiff
23 states that he sent a BP-S148.055 form to the Warden asking that his central file be
24 purged of certain documents. The Warden denied such request. Plaintiff sent another
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26 ¹ Because the Court finds that Plaintiff has failed to exhaust his administrative remedies, it is not
27 necessary to address the statute of limitations and exemption arguments proffered by Defendant.

1 request and again the request was denied. Plaintiff wrote to the BOP Regional Office and
2 other prison officials and repeatedly requested that his central file be purged of certain
3 documents. All of his requests were denied. Plaintiff then filed a Freedom of Information
4 Act request requesting certain documents from his central file. Plaintiff received 125 pages
5 of documents in return.
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7 Plaintiff states that every response he received from his requests repeated language
8 from BOP policy which allowed the BOP to maintain records of expunged prohibited acts.
9 Plaintiff claims that this demonstrated that pursuit of an administrative remedy would be
10 futile. Plaintiff also argues that Defendant's Motion is not properly reviewable as a motion
11 to dismiss because it includes documents that were not referred to in the complaint.
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13 In his Reply, Defendant states that Plaintiff's concession that he failed to exhaust
14 the administrative remedy process is a valid ground for dismissal. As to Plaintiff's second
15 argument, Defendant contends that as an unenumerated 12(b) motion, it is treated in
16 abatement and that pursuant to caselaw, the Court can look beyond the pleadings in
17 deciding this issue. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003.)
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19 **III. LEGAL STANDARD**

20 Pursuant to the Prison Litigation Reform Act of 1995, "[n]o action shall be brought
21 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a
22 prisoner confined in any jail, prison, or other correctional facility until such administrative
23 remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Prisoners are required
24 to exhaust the available administrative remedies prior to filing suit. Jones v. Bock, 549
25 U.S. 199, 210–212 (2007); McKinney v. Carey, 311 F.3d 1198, 1199–1201 (9th Cir. 2002).
26 Exhaustion is required regardless of the relief sought by the prisoner and regardless of the
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1 relief offered by the process, Booth v. Churner, 532 U.S. 731, 741 (2001), and the
2 exhaustion requirement applies to all prisoner suits relating to prison life, Porter v. Nussle,
3 435 U.S. 516, 532 (2002) (federal prisoners suing under Bivens must first exhaust inmate
4 grievance procedures; administrative exhaustion is prerequisite even if administrative
5 remedies are not plain, speedy, and effective, and relief inmate seeks is not available).
6 “Proper exhaustion demands compliance with an agency’s deadlines and other critical
7 procedural rules . . . ,” Woodford v. Ngo, 548 U.S. 81, 90 (2006), and may not be satisfied
8 “by filing an untimely or otherwise procedurally defective . . . appeal,” Woodford, 548 U.S.
9 at 83–84.

11 A prisoner need not present a specific legal theory or constitutionally grounded basis
12 for his requested relief. Rather, all that is required is that the prisoner articulate a specific
13 deficiency and place the officials on notice of the area of concern. Strong v. David, 297
14 F.3d 646, 650 (7th Cir. 2002) (“As in a notice-pleading system, the grievant need not lay
15 out the facts, articulate legal theories, or demand particular relief. All the grievance need
16 do is object intelligibly to some asserted shortcoming.”); see also Doe v. Wooten, 2010 WL
17 2821795, *2 (N.D. Ga. July 16, 2010).

19 The BOP has established an administrative remedy process through which an
20 inmate seeks review of any complaint regarding any aspect of prison confinement. See
21 C.F.R. §§ 542.10 through 542.19. The Administrative Remedy Program entails three
22 steps. 28 C.F.R. § 542 et seq. The grievance must be presented to institutional staff
23 through BP-9 form. 28 C.F.R. § 542.14(a). Then, the grievance is appealed to the
24 Regional Director through a BP-10 form. 28 C.F.R. § 542.15(a). Finally, the grievance is
25 appealed to the General Counsel in the BOP’s Central Office. 28 C.F.R. § 542.15(a).
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1 Exhaustion only occurs if all three steps are completed.

2 **IV. ANALYSIS**

3 First, Plaintiff claims that Defendant's Motion is improper. However, in deciding a
4 non-enumerated Rule 12 motion to dismiss for failure to exhaust available administrative
5 remedies, the Court may consider the parties' submissions outside the pleadings and
6 decide disputed issues of fact. Wyatt, 315 F.3d at 1119-20. Defendant has been afforded
7 an opportunity to develop the record, and has done so by pointing to and discussing
8 extensive documentation to support his arguments. Id. at 1120 n. 14.

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10 Second, from evidence provided by Defendant, it is obvious that Plaintiff did not file
11 a grievance regarding this Privacy Act claim against Defendant BOP nor did he file any
12 grievance complaining about his central file. Plaintiff does not appear to disagree with this
13 statement. However, Plaintiff seems to believe that requesting that his central file be
14 purged and requesting that he be allowed copies of certain documents, somehow acted
15 as a grievance so as to place Defendant on notice of Plaintiff's Privacy Act complaint.
16 Plaintiff further appears to believe that receiving repeated denials of his request
17 demonstrates the futility of filing a grievance.

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19 Here, Plaintiff claims that Defendant BOP violated the Privacy Act through its
20 maintenance of inaccurate records and use of those records as the basis for decisions that
21 adversely affected Plaintiff. Plaintiff's requests sent to a Warden and other prison officials
22 explain that a charge against Plaintiff had been expunged yet the incident report for the act
23 was still in his file. Then, he would request that these documents be purged from his file.
24 In several of the responses received, Plaintiff was told to direct his requests to institution
25 staff through the administrative remedy procedure at the prison. (ECF No. 108, p. 23.)
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1 Plaintiff also sent requests for documents under the Freedom Of Information Act. He
2 received some of the documents requested and was told how to appeal the decision if
3 necessary. (ECF No. 108, p. 26.)

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5 Plaintiff's communications to the Warden and other prison officials neither excused
6 Plaintiff's failure to properly submit the appeal, nor relieved him from proceeding through
7 all the steps in the grievance process. See Woodford, 548 U.S. at 91, 93 (exhaustion
8 under the PLRA requires "compliance with an agency's deadlines and other critical
9 procedural rules"); Wilson v. Wann, 2008 WL 4166886, *2 (E.D. Cal. Sept. 8, 2008) (letters
10 to Internal Affairs and warden were insufficient to show exhaustion); see also Lees v.
11 Felker, 2009 WL 2824862, *5 (E.D. Cal. Sept. 1, 2009) (letter to warden is not an
12 alternative method to the inmate grievance process for exhausting administrative
13 remedies); Panaro v. City Of North Las Vegas, 432 F.3d 949, 954 (9th Cir. 2005)
14 (participation in internal affairs investigation did not exhaust); Macias v. Zenk, 495 F.3d 37,
15 44 (2d Cir. 2007) (informal complaints did not exhaust); Singh v. Goord, 520 F.Supp.2d
16 487, 495 (S.D.N.Y. 2007) (letter to warden did not exhaust).

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18 Also, Plaintiff argues that the repeated denials of his request demonstrate futility in
19 pursuing the administrative remedy process. However, futility is not an exception to the
20 exhaustion requirement. Booth, 532 U.S. at 741 n. 6 ("[W]e will not read futility or other
21 exceptions into statutory exhaustion requirements where Congress has provided
22 otherwise."); see also Tatum v. Rosario, 2005 WL 2114190, *2 n. 4 (E.D. Cal. Sep. 1,
23 2005).

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25 Based on the evidence, the Court finds that Plaintiff failed to follow the appeals
26 procedure that was available to him even after being directed to use it by prison officials.
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1 **V. CONCLUSION AND RECOMMENDATION**

2 Because it is undisputed that Plaintiff did not properly exhaust his administrative
3 remedies prior to bringing this action, the Court does not have jurisdiction over his claims
4 against BOP. Therefore, the Court HEREBY RECOMMENDS that Defendant BOP's
5 Motion to Dismiss for failure to exhaust be GRANTED.
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7 These Findings and Recommendations will be submitted to the United States
8 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l).
9 Within thirty (30) days after being served with these Findings and Recommendations, the
10 parties may file written objections with the Court. The document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." The parties are
12 advised that failure to file objections within the specified time may waive the right to appeal
13 the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).
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16 IT IS SO ORDERED.

17 Dated: August 11, 2011

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20 UNITED STATES MAGISTRATE JUDGE
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